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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

NO. 837

JOHN P. KINSEY, individually, and as a director and stockholder of Monroe Paper Products Company, and LAWRENCE G. KUNKEL and THE WATERBURY CORRUGATED CONTAINER CO., individually and as stockholders of said Monroe Paper Products Company,

Petitioners,

v.

BURTON S. KNAPP, CHARLES E. RANEY, GEORGE A. BLUM, DON B. LEATHERS and ARTHUR W. SEMPLINER, individually and as directors, officers and stockholders of Monroe Paper Products Company and as Trustees under a Voting Trust Agreement dated December 31, 1953,

Respondents.

PETITIONERS' REPLY BRIEF

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As to Facts

Petitioners do not expect this Court to

> "search all the depositions and affidavits to see whether it is possible to contradict the Court of Appeals' finding of a dispute meriting full hearing."[1]

What petitioners have requested is that this Court determine whether the Court of Appeals was justified in re-

[1] Respondents' brief, page 16.

versing the partial final summary judgment of the District Court rendered under Rules 54(b) and 56(c) FRCP, and in directing unit trial of all issues; in view of the facts which were not disputed in either court and are not disputed in this Court.

In compliance with Rule 23(e),[2] petitioners have stated the facts material to a judicial determination of the validity of the voting trust. In each instance reference was made to the place in the record where the fact was established, either by the depositions, admittedly genuine exhibits, formal admissions, approved findings or undisputed sworn testimony. In the main, the facts relate to respondents' fiduciary relationship to the corporation and its stockholders, the misuse of that relationship, respondents' acquisition through the escrow arrangement of a large part of the stock later deposited under the trust, the terms of the trust agreement, the extent of the offering, the offering letter and enclosure, respondents' efforts to consummate the trust and to acquire additional stock and voting trust certificates *after* petitioners' action was commenced and the SEC was alerted, and Waterbury's subsequent efforts to protect its investment by acquiring stock of depositing stockholders who demanded return of their stock.[3]

We submit that the onus of making clear just what *issue* of material facts respondents claim existed rests on their counsel and such issues should not only be apparent from respondents' counter statement of facts but also be supported by the record.

The first four[4] *of the six pages of respondents' "Counter-Statement of the Case"*[5] *do not even purport to be a counter statement of the material facts determinative of the validity of the voting trust nor disputative of the*

[2] Requiring statement of "the facts material to the consideration of the questions presented."

[3] Pages 12-29, Petition for Certiorari.

[4] Page 2 to the bottom of page 5 of respondents' brief in opposition to the petition for certiorari.

[5] Pages 2-7 of respondents' brief.

facts stated by petitioners,[6] nor does it appear to comply with Rule 40, Section 3, as to statements corrective of inaccuracies or omissions in the statements of facts made in briefs of other parties. Significantly, the Counter-Statement is preceded by the statement of respondents' counsel that

> "* * * we state our *version* of the facts in some detail." (Italics added)

The great bulk of the references to the record claimed to support this "version" is to assertions made in the answer of the respondent as trustees,[7] the answer and counterclaim of respondents as individuals and officers-directors,[8] a written argument or "presentation" made by respondents, to the SEC,[9] and to statements made in newspaper advertisements and articles.[10] The important *point is that, without challenging the facts dispositive of the legal questions as to validity of the trust, most of the Counter-Statement rests on mere assertions that have been overcome by undisputed sworn testimony, depositions, admissions, exhibits and approved findings referred to in the petition.*

A good example is the assertion on page 3 of the Counter-Statement:

> "By February 1, 1954, more than 50% had been so subscribed (116a, 258a)."

The reference to page 116a is to a somewhat different allegation in respondents' answer that does not contain the words "subscribe" or "subscribed", and the reference to page 258a is to a newspaper article dated February 9, 1954 stating that majority stockholders had deposited their stock under the trust agreement. However the undisputed facts are that, by its terms, the trust agreement was effective only upon execution of the agreement or deposit of stock by the majority stockholders (85a, 86a, 94a); the necessary 50% was 93,336 shares (Admission 7, 20b, 131b);

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[6] Pages 12-29 of the petition for certiorari.
[7] References to pages 98a-126a.
[8] References to pages 127a-150a.
[9] References to pages 236a-246a, 289b-291b.
[10] References to pages 256a-258a.

the owners of only 15,214 shares ever signed the agreement or a counterpart (267b, 388b) and, including the stock of many of them, 37,411 shares only had been deposited on February 1, 1954 (Admissions 472 and 510, 71b, 76b, 167b, 188b).

Undoubtedly it was the failure of the Court of Appeals to note the distinction between such and similar *assertions* by respondents and the established undisputed *facts* that led it to set aside the partial judgment because of mere assertions in the respondents' counterclaim and to ignore the undisputed facts determinative of the validity of the trust.

We pass to the few instances in which respondents[11] purport to *contradict petitioners' statement of facts*, in order to ascertain whether any material dispute of facts exists and, if so, whether it is such as to disentitle petitioner to the partial final judgment that the trust was invalid as a matter of law.

In the Counter-Statement it is asserted:

> "There was no company policy to buy stock for retirement" (page 5, last paragraph).

This assertion is not substantiated by any of respondents' references.

On June 7, 1941 there were 212,150 shares of the stock outstanding including 2,060½ shares of repurchased shares held in the treasury, and between 1941 and 1952 22,150 additional shares were purchased and retired by the corporation (Admission 7, 20b, 131b). The policy thus adopted was ratified at various directors and stockholders meetings and referred to as the "general policy" (315b). At the September 1952 stockholders meeting the prior purchase of 10,000 additional shares for the corporation was ratified by the stockholders, thereby reducing the outstanding shares to 190,000, and a resolution authorizing purchase of an additional 10,00 shares was also adopted (Approved Finding 6, 379b, Appeal No. 12676; see also

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[11] Bottom of page 5 to page 7.

214a-216a herein). The purchase of 3,329 shares pursuant to this resolution reduced the outstanding shares to 186,671 shares (Approved Finding 4, 377b, Appeal No. 12676; Admission 7, 20b herein). The corporation undisputedly had a "general policy to buy stock for retirement and to buy it through the respondent officers.

> "There was no obligation on any officer or director to buy stock for the company except an authorization to buy from any stockholder who might be in distress and unable to find a market," (pages 5-6).

There is no dispute as to the text of the specific resolution adopted *by the stockholders* in September 1952 (Approved Finding 6, 379b, Appeal No. 12676, see also 22b, 214a-216a herein), nor as to the complete adherence to the resolution by the corporate officers until after respondents assumed control upon Groesbeck's death (Admissions 14-17, 23b, 131b). Whatever dispute there is as to the resolution relates solely to its legal effect and to the legal duties it imposed.

> "Petitioners' activities having created an unprecedented market, both factions regarded the authorization as no longer in force;" (page 6).

It is undisputed that petitioners were not even stockholders and did not purchase any stock in the corporation until October 1953 after the purchases of stock through the escrow arrangement had been made and had enabled respondents to defeat the National Container Corporation offer and to control the 1953 annual meeting (page 13, petition for certiorari). It is also undisputed that these self serving purchases in violation of the resolution were not disclosed at the meeting, that the unfilled 1952 resolution was not repealed by the stockholders and that "no action was taken" by the stockholders on a suggestion that a further reduction of the corporation outstanding stock to 150,000 shares be authorized (Minutes, 220b).

> "in fact, petitioners' faction threatened litigation if any stock was sought for the treasury" (page 6).

Whatever Feinberg may have threatened in August 1953 (220a) was prior to petitioner's acquiring any interest in the corporation and cannot fairly be referred to as an act of "petitioners' faction"; nor, in any event, could it alter the duties to Monroe's stockholders generally which were imposed by the corporation's policy and the unfilled 1952 stockholders' resolution.

> "Petitioner Kinsey is a director and has been buying stock personally;" (page 6).

This is untrue and not one of the references to the record made in support of this statement bears it out. It is undisputed that the only purchase of stock made by Kinsey was at the directors meeting on October 13, 1953 shortly after petitioners became stockholders, when Kinsey with the consent of all directors purchased 50 shares from one of the directors in order to qualify as a director. (Admission in respondents' answer, 135a).[12]

> "The petitioners' faction had a rival escrow for buying from stockholders who were willing to sell to National Container * * *" (page 6).

Not one of the references made by respondents supports the statement that any of petitioners were part of any faction involved or were interested in such an escrow—all of which related to a period prior to petitioners becoming stockholders. The undisputed fact is that petitioners bought no additional stock until the trust program was sprung on them, made one purchase thereafter in January 1954,[13]

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[12] Kinsey has been the only representative of petitioners on the eight man board. Directors Feinberg, Krave and Grant, who favored the National Container offer, were associates of the deceased Groesbeck and members of the board long prior to petitioners acquiring any interest in the corporation, and any acts of theirs were not of any "petitioners' faction." The acts referred to preceded petitioners' first purchase of stock.

[13] Deposition, Griffen, Appendices on first appeal No. 12676, pages 682a and 2487b thereof; Deposition Kunkel, Appendix same appeal pages 874a-875a thereof.

and no others until compelled to compete with respondents' purchases during March-August, 1954 (Petition for certiorari, pages 21-22).

> "The purpose of the voting trust was not to corner the market in the stock or to manipulate stock prices" (page 6).

Respondents, in their answer (114a) admit that one of the purposes of the voting trust was to "prevent the plaintiffs from acquiring control of the company." Knapp's testimony (216a-217a) confirms that the price fixing was considered an essential inducement in procuring deposits of stock under the agreement. The $15 price fixed was 50% above the market price (Citations, page 18 of the petition for certiorari).

> "The law office memorandum which petitioners quote is not a fair statement of facts (161a-162a, 184b); (page 6).

The memorandum is Exhibit 223.[14] It is admittely genuine (209b). The attorney who wrote the memorandum testified that the information reflected therein was received by him from respondent Raney (392b). Although Raney testified on the trial, he did not dispute any statement made in the exhibit nor the testimony of the attorney. The references 161a-162a and 184b, made by respondents are to their admission that the memorandum was prepared by the attorney after his conference with Raney, and "said exhibit contains certain information and omits certain other information furnished him by Raney at their earlier conference" 161a-162a). What the omitted information was is not disclosed, and no reference to the memorandum is made in the so-called affidavits of merit.

> "It [the Huber letter of December 31, 1953] contained no material misrepresentations of fact (177a). The stockholders named in the letter as having al-

[14] Printed in full (269-271b), and partly quoted on pages 14-15 of the petition for certiorari.

> ready signed the agreement had in fact committed themselves in writing that they would sign as soon as the agreement was printed, and they all did so;" (page 6).

It is undisputed that the letter made no mention of the fact that by raising $167,410, largely from suppliers and others who were dealing with the corporation, 15,538 shares had been purchased through the escrow arrangement at $10 per share and were to be deposited under the voting trust. The printed list of "signers" (Exhibit 22, 235b) enclosed with the letter was headed by the clear misrepresentation that the list was of the "Stockholders *Who Have Signed The Voting Trust Agreement Prior to the Time of Starting the Agreement Sign-Up Compaign.*" None on the list (other than respondents solely as trustees) had signed the trust agreement or deposited their stock (Page 41, petition for certiorari).

The alleged commitment to sign the agreement is Exhibit 28, a photostat of which appears at 239b. It consists of signatures only and the heading and the date were not added until late in December 1953 or early January 1954 (331b-332b, 336b-337b, 339b-340b).[15] It is not a commitment and was not an enforceable agreement. It did not contain the signature of Ida M. Sempliner (mother of respondent Sempliner) who owned 7203 shares and who never did sign the trust agreement and did not deposit her stock until March 17, 1954. Nevertheless Mrs. Sempliner was listed on the typewritten list (Exhibit 22) sent to stockholders as one who had signed the agreement and her shares were included in the total of 41,114⅛ shares as one who had already signed. Listees Edgar and Ruth Marvin never signed the agreement nor deposited their stock (See page 41, petition for certiorari).

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[15] These signatures were obtained at a time when an entirely different price fixing type of agreement was proposed (Deposition Exhibit 36, 247b-253b; Trial Exhibit 223, 269b-271b, Depositions Knapp, 331b-332b, Leathers, 332b-333b, Blum, 336b-337b, and Gutman, 239b-340b).

[Petitioners] "first filed the complaint charging misrepresentations and then went out and bought voting trust certificates" (page 6).

Respondents make no reference to the record to support the statement. The facts pertaining to Waterbury's acquisition of the stock and rights of certain depositing stockholders after the action herein was commenced, are stated in the petition for certiorari, pages 21-22.

"No company time or company funds were ever used to organize or support the voting trust (116a)" (page 7).

The reference to 116a is to respondents' answer to the complaint. In the instant proceeding petitioners did not ask summary judgment on the ground that company time or "funds" were so used.[16]

"For the fiscal year ended June 30, 1956, the company's actual loss was $40,694 and not $79,382. In the year ended June 30, 1957 there was some improvement and the actual loss was only $13,369.13" (page 7).

The corporation's operating losses were $79,382 and $22,106.49 in 1956 and 1957 and were reduced by income tax credits claimed as a result thereof (30b-31b, 103b-105b, 131b-132b, 207a-208a). The petition for certiorari (page 14) correctly and aptly compared the operating results before taxes with the pre-tax earnings of $449,000-$556,000 in the three prior years.

"As to there being some error of form in the affidavit of merit, the District Judge held that the point

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[16] However, petitioners do allege such use in their complaint. Proofs of such use were taken by depositions and on the trial. On the appeals Nos. 13, 355-13, 356 the established misuse of corporate funds, facilities and positions was briefed and argued. See, also, Approved Findings 47b and 47c as to the undisputed use of the corporations' employees, credit and facilities, 329b-322b.

was too technical to necessitate any amendment (185a)."

On page 185a it clearly appears that on June 26, 1957 the District Judge said:

> "I would say to you gentlemen, under any circumstances, you better make another affidavit, and you would, and this one would comply with the rule. I know that. Nobody gets off on a technicality in this court. I mean nobody gains or loses on a technicality if I can help it.
>
> "So this morning, insofar as facts affect this lawsuit, I am taking the position that you did comply with the rules. If you want to file another affidavit later on, or if you think this is sufficient, it is all right" (185a).

No corrective affidavit was filed by respondents although the motion was not decided until July 30, 1957.

We revert to three assertions made in respondents' Counter-Statement at page 2:

> "Nearly all of its stock was owned locally" (page 2).

At the time the voting trust was announced 186,671 shares were outstanding, held by over 430 stockholders of which 60 resided outside of Michigan (Citations, pages 13 and 19 of the petition for certiorari).

> "The local stockholders proceeded to organize a voting trust. This trust was immediately joined by about 300 stockholders * * * (page 2). All of the subscribers except 36 resided in Michigan" (175a) (page 3).

The organizing group consisted of the respondents, aided by the corporation's employees who worked under them.[17] Petitioners concur in the assertion that the sub-

[17] Petition for certiorari, pages 14-16; Deposition Exhibits 34A and B, 243b-244b; Approved Findings 44a and 47c, 320b-322b.

scribers owned about 52% of the outstanding stock. However the solicitation and deposit of a majority of the stock required from January 7 to March 17, 1954—the latter date being a month and a half after petitioners' action was commenced attacking the validity of the trust and seeking to prevent is consummation. *Respondents' Counter-Statement makes no reference to the extent of the stockholders' knowledge or information concerning the affairs of the corporation.*

We have thus demonstrated that respondents' Counter-Statement discloses no genuine issue as to any fact. But even if the attempted contradictions created some shade of an issue on the facts to which they relate, in no instance would it be as to a fact that would be material in deciding the legal issues posed by the motion for partial judgment.

REPLY ARGUMENT

Petitioners' reply contentions are indexed, page i, ante.

Petitioners contend that:

I. The Affidavits of Merits Do Not Meet the Requirements of Rule 56(e)(f) FRCP.

The rule requires that an affidavit opposing a motion for summary judgment shall be on personal knowledge, shall set forth facts admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Further, if it appears from an affidavit of a party opposing the motion that, for reasons stated, he cannot so present essential facts, the court may refuse judgment or grant a continuance to permit obtaining same or to take depositions, etc.

The affidavits of merit do not comply with the rules in the following respects:

They state affiants' expectation that petitioners "will have no evidence to sustain" the asserted facts and that, "if necessary we shall disprove them." The affiants state generalities and conclusions as to facts and law and repeatedly state that "we are advised", "we are informed", "to the best of our knowledge", "as far as we know", and "numerous witnesses * * * stand ready to testify." The affidavits fail to show what is stated on knowledge and what is stated on belief, and repeatedly fail to show competency to testify to the facts or that the facts would be admissible in evidence. They state no efforts made to procure affidavits or evidence of others as to whose knowledge or information they purport to speak.

Respondents declined the court's suggestion that they comply with the rule by filing another affidavit (185a) although more than a month elapsed between the suggestion and the court's decision on the motion.

II. Respondents Have Not Shown That There Was or Is Any Genuine Issue of Material Fact Preclusive of Adjudication of the Invalidity of the Trust as a Matter of Law.

It is clear from respondents' limited attempts to *contradict* petitioners' statement of facts that there is no genuine issue as to the facts that:

(a) It was the company's policy to buy its outstanding stock for retirement, the respondents were under obligation to do so, and petitioners did not threaten litigation if that was done.

(b) Petitioners' activities did not create an unprecedented market for the stock, but respondents did through the escrow purchases prior to petitioners buying their stock. Petitioners were not a part of any faction having an escrow arrangement for stock purchases, and Kinsey while a director did not buy any stock.

(c) The voting trust was created by respondents with the assistance of employees of the corporation who worked under them; it grew out of consultations by Raney with an attorney who made a memorandum of what Raney told him, and the testimony of the attorney and the contents of the memorandum are undisputed. The purpose of the trust was as stated in the attorneys' memorandum; the trust agreement is in writing and unambiguous, and its purpose and effect clearly appear therefrom.

(d) The trust agreement was open-ended. The initial offering was made to substantially all of the corporation's 430 stockholders and was ultimately accepted by more than 80% of them. The offering was made without compliance with either the federal or state securities laws. Almost 1,300 mailings were made in the solicitation and in the delivery of certificates. Over 60 of the stockholders resided in states other than Michigan. It is not claimed that the offerees had

ne information that a proper registration statement and prospectus would have contained, and no claim is made other than that the local stockholders were "extensively informed regarding the Company's affairs." The soliciting letters did not supply the required information, particularly as to the purchases by respondents and their associates through the escrow arrangement and their continued efforts to purchase at $10 a share during the trust solicitation. The false list of signers was sent to those who had lost contact with company affairs. At least some of the stockholders didn't understand the proposed transaction and some of the provisions of the agreement which a prospectus would have brought into the open were not known to some of the trustees themselves (See petition for certiorari pages 39-42).

(e) The Huber letter of December 31, 1953 soliciting deposits of stock under the trust agreement contained material misrepresentations as to the pre-campaign "signers" of the trust agreement and it omitted to disclose the material facts as to the purchases of stock under the escrow arrangement, the continued efforts to purchase and the intended deposit of such stock under the trust agreement.

(f) Petitioners status as a director and as non-depositing stockholders at the time suit was commenced is not contested. Petitioners did not purchase any additional stock and rights of depositing stockholders until after their action had been filed and only after respondents had begun to purchase voting trust certificates to prevent rescissions by the holders thereof.

III. As a Matter of Law There Was a Public Offering of the Voting Trust Certificates.

The so-called affidavits of merit (17a-183a) are silent concerning the stockholders' knowledge of and information as to the kind of information which registration would disclose, the only statement being:

> "The invitation to join in the voting trust was never extended to the general public. It was addressed only to a limited group of people (approximately 300 named individuals) who were already stockholders of the defendant corporation. Most of them were residents of Monroe, Michigan or its vicinity. They were extensively informed regarding the Company's affairs. We were and are advised by counsel that under the circumstances here present the voting trust invitees were 'a limited class of informed persons able to fend for themselves,' (*S.E.C. vs. Ralston Purina Company*, 346 U.S. 119 at 122) so that the transaction was not a public offering" (175a).

Securities & Exchange Commission v. Ralston Purina Company, 346 US 119, 97 L ed 1494 makes it clear that the non-public offering provision is an *exemption* from the operation of the Securities Act and that the burden of establishing its application is on the issuer of the security.

> "Keeping in mind the broadly remedial purposes of federal securities legislation, imposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable. * * *"

The decision further holds that the applicability of the exemption depends on whether the offerees had "access to the kind of information which registration would disclose."

Judge Picard held that there had been a public offering of the voting trust certificates.[18]

The requirements of the summary and partial judgment rules either apply to the instant action or they do not. In holding that respondents were entitled to a second opportunity, by actual trial, to show that there was no public offering of the trust certificates, the Court of Appeals necessarily held that respondents' affidavits of merits were sufficient to create a genuine issue of material fact. If the mere statement that some of the offeree stockholders "were extensively informed regarding the Company's affairs" and that respondents were advised by counsel that the offerees were able to fend for themselves was sufficient to prevent judgment in this case, such will also apply to proceedings by the Commission to enjoin violations of the securities acts, proceedings to punish for such violations, and to actions to recover consideration paid for securities illegally issued or for damages. Such easy means of avoiding judgment on undisputed controlling facts will be a serious impediment to enforcement of securities laws. Such escape is not in accord with the Ralston Purina decision. We submit, the problem warrants consideration by this Court.

There is no "nonpublic offering" exception in the Michigan Blue Sky Law, nor under the federal securities acts when misrepresentations or misleading omissions are made in solicitations by mail, etc. Respondents do not contend that there is.

The question of violation of the state and federal *securities* laws presented only part of the important and controlling questions as to the legality of the trust.

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[18] Judge Picard held:

> "In view of the cases and sections above cited, there can be no doubt that defendants violated the Security Act. This is true because clearly defendants as issuers of the voting trust certificates made a public offering of a security covered by the Security Act." (Appx. 144).

IV. Petitioners Were Entitled to a Review in the Court of Appeals as to the Adverse Determinations Made by the District Judge and Appealed from by Petitioners as to the Invalidity of the Trust Agreement Because of Violations of Fiduciary Duties Owing to the Corporation and Its Stockholders and Violation of Federal and State Laws Proscribing Trusts in Restraint of Trade and Restraints of Alienation of Property.

Respondents contend that they had the right of appellate review as to the determinations of the District Judge that were unfavorable to them, but that petitioners, neither under the "right result-wrong reason" rule nor as cross appellants, had no right to review the determinations that were unfavorable to petitioners; citing decisions that a denial of summary judgment is not a final judgment. The four cases cited by respondents involved a total denial of the motion for summary judgment and not the granting, on one of several grounds, of the final partial judgment expressly made appealable *and which also expressly determined other grounds adversely to the movant* —as in the instant case.

The motion for summary judgment presented the following important and controlling questions of law as to the legality of the agreement:

> Did the trust agreement, intentionally or otherwise, actually create duties and loyalties as to the voting trustees which were inconsistent with their duties and loyalties as sole officers and majority directors of the corporation?
>
> Did the trust agreement, intentionally or otherwise, actually fix prices, impose tie-in arrangements, pool interests, or otherwise restrict trade contrary to the federal or state antitrust and restraint of trade laws, or restrain alienation of property contrary to Michigan law?
>
> If the trust was illegal or was being consummated in an illegal manner at the time the aid of the Dis-

trict Court was sought, were petitioners, either as a director, stockholders, non-depositing stockholders, or as individuals who were threatened or damaged by violations of federal and state anti trust and other laws, entitled, derivatively or individually, to prevent consummation by judicial process?

The District Judge, contrary to Rule 56, FRCP largely ignored the undiputed facts appearing in the depositions, former testimony, admittedly genuine exhibits and admissions. *He did not, however, merely decline to rule on any of the above questions of law which are fundamental to the further conduct of the case. He expressly ruled that:*

a. Despite the fact that the Michigan statute expressly prohibits "every contract" fixing prices, pooling, etc., a Michigan decision prior to enactment of the statute "narrowed the prohibition to the unreasonableness of any contract encompassing price fixing" and that the trust agreement was not unreasonable under any of the four tests suggested in this decision "as a matter of law" (Appx., page 139).

This decided a question of law fundamental to the validity of the trust and also to the further conduct of the case. The decision states that it is final as to the non violation of the statute *by the agreement itself* and also that, to such extent, it disposes of the double damage claims. All it left open was the possibility that unreasonableness may be shown by facts beyond the terms of the agreement (Appx., pages 147-148). The District Judge certified that the decision was intended to be appealable (Appx., page 148). We submit that it was a final decision of law dispositive of a question ripe for decision and fundamental to the validity of the trust and to further conduct of the remainder of the case, and that due process and equal protection of law demand that it receive appellate review before further trial.

b. Despite the fact that the federal antitrust laws render all price fixing illegal per se if it affects interstate

commerce, good intentions or reasonableness notwithstanding, the trust agreement did not fix prices but "simply authorized the trustees not to sell to any person who would not buy all of the stock at $15.00 per share" (Appx. pages 140-141).

Here again, the decision of a fundamental question of law is stated to be final and to affect not only the validity of the trust but also the further conduct of the case (Appx., page 148). We submit there is no just cause for delay in either affirming or correcting. The trust agreement clearly provides that for five years the depositors "will not sell their respective Company shares," the Trustees "shall have the exclusive power to sell said shares," and that "no sale shall be made by said Trustees save of all the deposited shares in lump * * * and at a less price than at the rate of $15.00 for each and every share so deposited." Either this, as a matter of law, illegally fixes prices, imposes tie-ins and restraints of trade and of alienation of property or it does not.

c. The Michigan cases do not sustain petitioners' contention that the trust agreement violates the common law of Michigan against restraints on the alienation of property (Appx., page 141).

Again, this is a decision dispositive of a question of the validity of the trust as a matter of law.

d. Despite the fact that paragraphs 3(a)-8(c) (170a-171a) of the motion for judgment presented the questions whether, in conflict with respondents' duties to the corporation and to all of its stockholders, the trust agreement imposed upon respondents obligations and loyalties to act for the particular benefit of the depositing stockholders and to the detriment of the nondepositing stockholders and plaintiffs, the District Judge restricted discussion to paragraph 8(d) and determined that two decisions of the Sixth Circuit[19] required that divided loyalty be found only after "proof" (Appx., pages 142-143). This we interpret

[19] *Seagrave Corp v. Mount* (CA6), 212 F 2d 389, and *Ashman v. Miller* (CCA 6), 101 F 2d 85.

to mean proof of *accomplished favoritism and damage*. We contrue the decisions and the law as holding precisely to the contrary and as holding that the only proof required is that the fiduciary has assumed a position where his loyalties are or might be divided.

There is no dispute as what was done. Petitioners contended that the District Judge, in each of the above instances, erred in a matter of law as to the validity of the trust, and petitioners sought correction by cross appeal and by respondents' appeal. The Court of Appeals, however, made no ruling thereon and, for reasons aliunde, ordered remand for a full trial of all issues before any appellate decision from that Court can be obtained.

Petitioners did not "move for summary judgment on the following complicated theory" as stated in respondents' brief, page 8. The motion is printed (165a-173a) and the words "voidable", purchase of "trust certificates", "with notice" and assignability of any "right of rescission" are no part of it. The motion asserted that specified federal and state laws were violated in attempting to consummate the trust, that the trust agreement itself was "void" (17a), that no genuine issues of material facts were involved in the determination of these questions, and that petitioners were entitled to judgment and injunctive relief. Petitioners' right to relief is based on their unquestioned status as a director, stockholders, nondepositing stockholders, and persons damaged and threatened with damage by violations of federal and state antitrust and other laws, which violations their fiduciaries were and are attempting to commit and to profit by at the expense of petitioners and the corporation. From the beginning petitioners took the position that all of the owners of the corporation's stock of which respondents had illegally obtained possession were entitled to its return and to exercise the appurtenant voting rights. This claim was made in behalf of the corporation, its stockholders generally, and of petitioners individually. The subsequent compulsory purchases, by Waterbury, of a part of the deposited stock and of the right to its return did not alter

the situation. The fundamental question remains whether, when suit is brought before the wrongdoing, consisting of clear violations of federal and state laws, is consummated, are the offending fiduciaries to be allowed to benefit thereby as against their *cestuis que* trust? (Please see petition for certiorari, pages 42-46).

V. Under the Circumstances, the Post-Action Purchases of the Stock and Rights of Certain Depositors by Petitioner Waterbury Company Did Not Affect the Rights of Petitioners or of the Corporation or Its Stockholders Generally to the Relief Sought in the Then Pending Action.

In the first place, all of the petitioners (owning 42% of the stock) had become stockholders, and petitioner Kinsey had become a director, as early as October 1953 and that situation existed at the time they filed their action for the benefit of the corporation and of themselves on February 2, 1954. As to the derivative phases of the action they were merely the instrumentality by which the corporation's rights were being invoked for its protection and for the protection of all stockholders and against the respondents who dominated and controlled it.

Koster v. Lumbermens Mutual Casualty Company, 330 US 518, 522-523, 91 L ed 1067, 1072-1073—holding that the corporation is the real party in interest.

Young v. Higbee Company, 324 US 204, 214, 89 L ed 890, 899—holding that the motive of a plaintiff in bringing a derivative action is immaterial.

In the second place, petitioners had, in and by their action, already taken the position that the voting trust was illegal, not only because of violation of the state and federal securities laws but because of violations of restraint of trade and other laws and of fiduciary duties. Moreover, the additional purchases were made by Waterbury only after the action had been commenced and then only because respondents continued to breach their fidu-

ciary duties and to thwart the judicial relief petitioners were seeking by procuring a large additional sum from one of the corporation's suppliers and using it to purchase voting trust certificates of depositors who were not willing to go along with the trust. Petitioners then acquired the property ownership rights of certain depositors who demanded return of their stock and, by supplement to their complaint filed May 13, 1955, alleged violations of the antitrust and restraint of trade laws and sought double and treble damages by reason of being forced to make such purchases Appx., Appeal 12676, pages 111a-116a; also 72a-77a on instant record).

Respondents claim that petitioners thereby sought to exercise *assigned rights of rescission*. Except for multiple damages, Waterbury has merely sought return of the stock which it purchased—pursuant to the demands therefor made by the vendor stockholders and because of the previously asserted invalidity of the trust. This is the same right of return of property it sought, *ab initio*, for all of the depositing stockholders.

Traer v. Clews, 115 US 528, 540, 29 L ed 467, 471:

> "* * * the assignment of Tappan to Clews was the transfer, not merely of a naked right to bring suit, but of a valuable right of property, and was, therefore, valid and effectual."

The Court of Appeals recognized the distinction in *Grand Trunk Western R. Co. v. H. W. Nelson Co. Inc.* (CA 6), 116 F 2d 823.

Respondents' contention that petitioners sought to exercise assigned rights of rescission is contrary to the record and to fact. (See pages 21-45, petition for certiorari).

The record is also devoid of any basis for application of an equitable estoppel against petitioners and under the decision of this Court in *Sola Electric Company v. Jefferson*, 317 US 173, 188, 87 L ed 165, 169 there exists no estoppel to question the validity of an agreement violative of the Sherman Act.

This Court has recently again made it clear that it is contrary to public policy to permit violators of state or federal statutes to enjoy the benefits of their illegal acts.

Tank Truck Rentals, Inc. v. Commissioner of Internal Revenue, 356 US ....., 2 L ed 2d 562; *Hoover Motor Express Co., Inc. v. United States of America*, 356 US ....., 2 L ed 2d 568.

The effect of the partial judgment is to deprive the respondents of the possession of the stock secured in violation of law and to restore normal corporate elections by the owners of the corporate stock. Under cumulative voting, 55.6% of the stock voting is required to elect five of the eight directors. The District Judge has ample jurisdiction to supervise the carrying out of the decreed election and to prevent abuses of power by those who may be elected.

VI. Jurisdiction of the District Court and the Court of Appeals to Determine Legal Questions Dispositive of the Validity of the Voting Trust by a Partial Summary Judgment Was Properly Invoked.

The principal argument advanced in respondents' brief (page 14) is that certiorari should be denied on the grounds that petitioners have maneuvered to avoid trial by pressing throughout for declarative and injunctive relief as to the voting trust and for partial judgment as to its invalidity. To a considerable extent this involves the ultimate question whether the two District Judges, who felt that partial judgments should be entered without the delay of a trial of the accounting and multiple damage claims and of the counterclaim, and felt that the right to vote the deposited stock should be determined promptly so that meetings of stockholders could be resumed, were or were not guided by the principles of sound judicial administration in suits involving both the operations and welfare of a corporation as a whole and

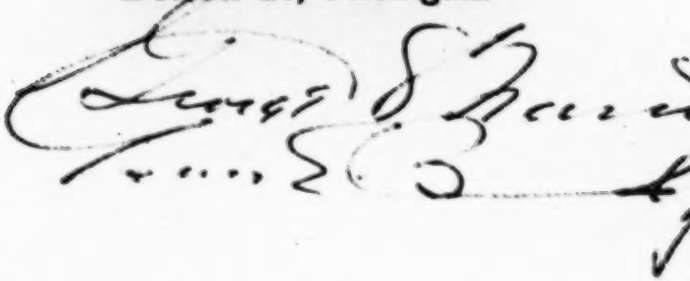
less pressing conflicts between individual groups of stockholders. Under the circumstances this can be decided only by this Court.

Insofar as Respondents have attempted to go farther and rewrite calendar entries and the proceedings below, we offer the corrections in an appendix to this brief, pages 25-28, post.

April 11. 1958.

Respectfully submitted,

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APPENDIX

On February 4, 1954 this case was filed, seeking injunctive relief. The trust was unconsummated and the respondents had secured less than half of the stock necessary to its consummation. In violation of the agreements made in open court, respondents thereafter issued certificates for the balance of the stock. Petitioners took approximately 3,5000 (not 5,000) pages of depositions and the respondents took approximately 1,500. Respondents' eight motions to dismiss, strike allegations, delay and prevent depositions, limit deposition inquiry and quash deposition subpoenas were filed and heard. Issue was not joined until August 23, 1954.

Trial commenced October 12, 1954 and continued until June 2, 1955. There was an adjournment from April 6 to April 13, 1955 to permit argument of the SEC appeal.* Judgment for the corporation was rendered August 4, 1955 and the opinion of the Court of Appeals reversing it was filed May 1, 1956. Petitioners sought rehearing and certiorari solely as to the imposition of costs and concurrently prepared for retrial, drafting and serving their requests for admissions before a new District Judge was assigned to the matter. Following assignment of the case to Judge Picard in October 1956, there were four hearings on defendants' motion for security for costs, their objections to requests and a motion of defendant Huber for summary judgment. The first pre-trial hearing was held January 7, 1957 at which time the trust had less than two years to run. Respondents finally replied to the requests for admissions on February 7, 1957, approximately six months after they had been served. On February 12, 1957 defendant Huber moved to dismiss. There was a hearing to determine the effect of respondents' demand for jury trial. The

*Decided October, 1955. See Admissions 514-534, 596-616, 658-715 (79b-82b, 87b-90b, 92b-103b, 167b, 168b, 189b, 191b, 193b-195b) and see testimony of Hart (395b-405b) as to the relevancy of the SEC testimony.

corporation filed requests for admissions. Two pre-trials were had in April 1957, but the case was not set for trial. The Court requested briefs on the Securities Act questions and announced that it would determine the law as to them and would then take up the restraint of trade questions. Counsel agreed (Transcript April 22, 1957, pages 83, 89-93, unprinted). On June 12, 1957 petitioners moved for summary judgment as to the trust which then had approximately a year and a half to run.

One particularly grave misstatement made by respondents at page 14, and substantially repeated in their brief re mandamus, is the accusation that "When retrial was again ordered on December 6, 1957 (249 F 2d 797) the District Judge fixed February 18, 1958 as the trial date. Had he gone forward with that program the trial would have been over by now; but at petitioner's instance the trial setting was vacated because of the present certiorari application". A similar accusation was made by respondents in the Court of Appeals in opposing stay so that the present certiorari could be sought. It was there contradicted by reply affidavit of petitioner's counsel dated February 7, 1958. Copy of the affidavit was sent to Judge Picard who, on February 10, 1958, wrote as follows:

> "Just received your affidavit in connection with motion for stay in the above matter and you are absolutely right.
>
> The only reason I set this case for the 17th was because I thought we might get started on it, but it was a tentative arrangement. Since then I have found I couldn't start it on that date if I wanted to because I have just returned from the hospital and the way I feel now may have to go back there before this letter reaches you."

The Clerk of the Court of Appeals is certifying the above additional record, including Judge Picard's letter (under title of Affidavit Re Motion For Stay of Mandate) to this Court. We ask that its filing be permitted.

The actual situation, as reflected in the calendar entries (1b-18b), is this: After a prompt, but prolonged.

first trial of both the issues of law and of fact as to the validity of the voting trust and a partial accounting for damages for mismanagement and breaches of fiduciary duty, counsel for respondents agreed with the Court that "it would advantageous * * * to have a separate judgment using Rule 54 * * * to get this issue settled so far as the voting trust agreements are concerned." (references, Petition page 26). Partial judgment as to the invalidity of the trust, on both questions of law and of fact, and for $306,982.62 partial damages was entered, appealed and set aside. By the time the pre-trial stage was again reached before the second District Judge the case had been pending almost three and one-half years, the five year trust period was approaching expiration, there had been no stockholders meeting for almost four years and the corporation's affairs had suffered. The management remained in positions of divided loyalty toward the corporate suppliers, customers, brokers and others having business dealings with the corporation. On pre-trial the second District Judge stated that he would first consider the legal questions involved, *seriatim;* counsel agreed. There being no issues of fact as to the terms of the trust agreement nor as to many basic facts, petitioners sought partial judgment, solely as to the trust and solely upon the applicable questions of law. The District Judge determined the questions of law, some in favor of respondents and some in favor of petitioners. In some instances his opinion was more complete than in others. In some instances he disregarded facts as to which there was no substantial controversy. He certainly did not determine any disputed facts. He certified that his determinations were final, dispositive and appealable. Each was as to a question fundamental to the validity of the trust and to the further conduct of the remainder of the case. His determinations were taken before the Court of Appeals by appeal and cross appeal. Instead of affirming or correcting them, the Court of Appeals has ruled that the case is complex, a counterclaim has been alleged and nothing should be determined as to any portion of it until it has been tried, in all of its aspects, without appellate guidance. Re-

spondents meanwhile remain in unbridled control of the corporation, the trust is to die a natural death, and, in effect, the status of the judicial process as of about September 1954 is restored. This, as we see it, regardless of how it has occurred, is an unfortunate, unjust and unnecessary failure of the judicial process. It presages nothing but renewed appeals and reversals, all too clearly reminiscent the rule of *Jarndyce v. Jarndyce.**

*See references in *Holder v. Dorman*, 351 Mich 30, 49 and *Continental National Bank v. Gustin*, 297 Mich 134, 146.